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NAFTA - Arbitration - Threats to Democracy - Ethyl v. Canada

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Foreword

This is an excerpt from Sold Down the Yangtze: Canada's lopsided investment deal with China. *This is a textual version of the pdf from here*

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Ethyl v. Canada

A good example of regulatory chill, and the threat to democracy, comes from one of the early NAFTA lawsuits against Canada: Ethyl v. Canada. This case was started by a U.S. company, Ethyl Corporation, after the federal government proposed in 1997 to ban MMT, a gasoline additive. Ethyl was one of the main manufacturers of MMT. The proposed ban responded to concerns from the auto industry that MMT interfered with new emissions technology in cars. There were also apparent health risks linked to inhalation of MMT in gasoline fumes.

At the time, MMT was banned or not used in nearly all the United States, due to health and environmental concerns, although Ethyl pushed repeatedly in the 1980s for MMT to be approved in the United States. Meanwhile, the federal government in Canada had approved MMT in the 1980s on the selfassured basis that there was not enough evidence of health risks.

When the federal government moved to ban MMT in Canada, in 1997, Ethyl launched a lobbying campaign against the proposed ban. This campaign was reminiscent of Ethyl's earlier

one against the banning of lead in gasoline, which Ethyl also manufactured.

In its later fight for MMT, Ethyl was joined by Canadian oil refineries who opposed the ban because it would bump up their costs; the estimated cost to re-tool refineries in Canada for an MMT-free world was reportedly around CDN$115 million. The refineries and Ethyl lobbied provincial politicians, some of whom joined the fight for MMT. Meanwhile, the auto industry supported the proposed ban, as did environmental groups and academic researchers tasked with investigating the health effects of MMT.

Most importantly, for our purposes, Ethyl's fight to keep MMT was helped by two new trade deals, both of which came into effect a few years before the federal government's proposed ban. One of the trade deals was NAFTA, the other was an internal Canadian deal called the Agreement on Internal Trade. The latter deal was modelled on NAFTA, and is a good example of how a foreign trade deal can have knock-on effects in Canadian law. Both deals gave Ethyl new options that were not available in its earlier campaign to keep lead in gasoline. Ethyl took advantage of the NAFTA option by invoking its obscure investor-state arbitration mechanism to sue Canada for the proposed ban. Ethyl argued provocatively-from the perspective of Canadian law-that its status as a U.S. company under NAFTA required that it get full compensation for its losses from Parliament's proposed ban, including for claimed damages to its reputation as an MMT manufacturer. A NAFTA tribunal was established and, in a decision that seemed to surprise Ottawa, the tribunal let Ethyl's claim go ahead. This was the first formal foreign investor lawsuit against Canada and one of the first under any investment treaty.

Meanwhile, Alberta used the Agreement on Internal Trade (AIT) to bring a separate claim against the federal government. And, before Ethyl's NAFTA lawsuit was finished, the AIT panel decided in favour of Alberta. Basically, the panel's majority objected to how the ban was designed-it limited trade in MMT instead of banning use of the chemical outright-and called for the federal government to withdraw the ban. The dissenting member of the panel would have allowed the ban to go ahead on environmental grounds. Indirectly, the case pointed to weaknesses in Canada's environmental regulations when a product's health or environmental risks are uncertain.

government allowed trade deals to trump health, the environHaving lost the AIT case, and still facing Ethyl's NAFTA lawsuit, the federal government pulled the proposed ban in 1998. It also issued a public statement that MMT was not a health or environmental threat and paid Ethyl about CDN$19.5 million in compensation. This amount of compensation was more than the budget (CDN$16.9 million) for Environment Canada's enforcement and compliance programs at the time. In exchange, Ethyl withdrew its NAFTA lawsuit. Personally, I think the Ethyl settlement was an unfortunate cave-in by the federal government, and a good example of regulatory chill. After taking a stand in support of the ban, the ment, and the pocketbooks of car owners. Yet, in the debate about regulatory chill, promoters of investor-state arbitration often deny that this case is even an example of a regulatory change due to an investment treaty. They point to the role of the AIT to deny that Ethyl's NAFTA lawsuit contributed to the settlement.

It is more credible to say that the Ethyl settlement was linked both to the AIT and to NAFTA. Clearly, the federal government's public statement and payment of compensation

were directly tied to Ethyl's NAFTA lawsuit, since Ethyl was not a party to the AIT case. Even the government's withdrawal of the ban is hard to attribute only to the AIT case, since the AIT panel could only make a non-binding recommendation and, even then, its decision was limited to the internal-not international-trade of MMT.

More broadly, it is revealing that Ethyl failed in its efforts to keep lead in gasoline, despite the uncertain science at the time about the dangers of leaded gasoline, but that Ethyl later succeeded in opposing the MMT ban. A key difference in Ethyl's successful MMT campaign was its right to use NAFTA arbitration, supported by the AIT.

MMT was phased out of Canadian gasoline on a voluntary basis in 2004. On the other hand, MMT was never used widely in the United States, where other additives replaced lead. So, one can say reasonably that, for about six years, NAFTA contributed to Canadians' exposure to MMT, and to emissions of other pollutants from cars when automobile emissions control systems failed because of MMT. It also contributed to innumerable trips by Canadians to the auto repair shop, after a car's engine light came on because MMT gummed up the catalytic converter.

These are unstudied costs linked to the ability of U.S. investors to sue Canada under NAFTA. They are hard to track, but still real for those who were affected.